IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KENNETH DALE NEWMAN
AND MARTY NEWMAN

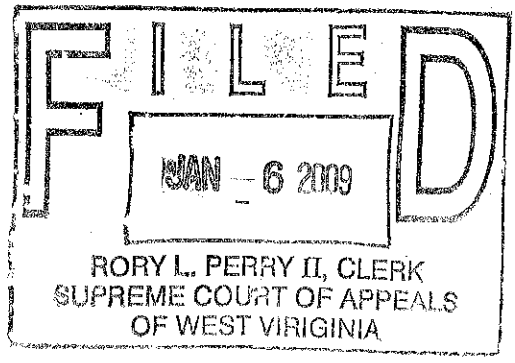
Appellants,

v.

CASE NO: 34332

JAMES E. MICHEL, JR. AND
TOMASINA MICHEL, HIS WIFE

Appellees.



BRIEF OF APPELLANTS

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I. Introduction and Nature of Case

Kenneth Dale Newman and Marty Lee Newman, Appellants herein and Plaintiffs below, brought this action against Appellees herein and Defendants below, James and Tomasina Michel, to enforce an express easement or, in the alternative, for a prescriptive easement across the Appellees' property. The matter was tried to the bench on June 4, 2007 before the Honorable John L. Cummings of the Circuit Court of Cabell County, West Virginia. On the day of trial, the Circuit Court granted summary judgment in favor of Appellees on Appellants' express easement claim, ruling that Appellants' Easement across Appellees' Property was in gross and expired in 1946. Trial then proceeded solely on the issue of whether Appellants had established a prescriptive easement. The Circuit Court entered its Final Order on September 13, 2007, finding in favor of the Appellees. Appellants filed a motion for new trial on September 21, 2007, which was denied on November 29, 2007. Appellants timely filed their Petition for Appeal on March 28, 2008. Appellants' Petition was presented to the Court on September 24, 2008, and this Honorable Court agreed 5 – 0 to hearing the instant appeal.

The Circuit Court's erroneous rulings that Appellants had neither an express, nor a prescriptive easement across Appellees' property have left Appellants with completely landlocked acreage and denied them their right to enter, use, and enjoy their Property. Appellants cannot protect their Property from trespassers, nor can they inspect it to ensure that no unsafe conditions exist. Moreover, the Property has lost substantial value, as it is nearly unalienable to anyone other than the Appellees. Appellants can no longer use or enjoy a most significant portion of their parents' legacy—their ancestral home. Appellants, therefore, respectfully request that this Court grant their appeal and address and reverse the errors herein described.

II. Statement of Facts

Kenneth and Marty Newman ("Appellants") are brothers and current owners in fee simple of an approximate 77 acre tract of real property located in Cabell County, West Virginia ("Newman Property" or "Property"). The Property continuously has been in the Newman family for more than 130 years. The Newman Property is bordered on its south, east, and north by property owned by Appellees, James and Tomasina Michel ("Appellees"). The Newman Property is bordered on its west by property owned by individuals who are not party to this litigation. The Newman Property has never bordered a public road and is totally and completely landlocked. Tr. Tran. Plaintiffs' Ex. 2.

Members of the Newman family have owned, lived on, or otherwise worked and enjoyed the Property since the late 1800's.[1] The closest public road access to the Newman Property is old County Road 26, which lies to the south of the Property and runs along the north bank of the Mud River. Appellees currently own the property located between the Newman Property and County Road 26. When Appellants' ancestors acquired the Property in the late 1800's, the only known access to the Property was via a recognized 20 foot wide road easement ("Old Road") which ran north-south from what is now County Road 26 across what is now the Appellees' property. Tr. Tran. p. 16–18; 53–54; 129–130; Plaintiffs' Ex. 2; Defendants' Ex. 1. The Appellees' predecessors in interest to their property originally lived in a log home located on the

[1]The Property was acquired by Appellants' paternal great-grandmother in the late 1870's. Appellants' paternal grandparents, Ulysses and Ida Newman, lived on the Newman Property from the 1890's to the 1950's. Appellants' parents also resided briefly on the Property in the 1940's and Appellant Ken Newman was born on the property in 1947. Appellants' father acquired sole title to the Newman Property in 1958 from his mother and his siblings. After the late 1950's, Appellants' uncle, Steve Newman, periodically resided on the Property until his death in 1973. Appellants' mother, Viola Newman, acquired title to the Newman Property upon the death of her husband, Hugh Newman, in 1974. Appellants Kenneth and Marty Newman acquired joint title to the Property upon the death of their mother in 2000. While no member of the Newman family physically resided on the Property after 1973, the Appellants and their families continued to regularly access the Property for recreation and enjoyment, until the access to the Property was blocked by Appellees. Tr. Tran. p. 11–12; 37; 40–41; 60; and Plaintiffs' collective Ex. 1 (Newman title chain).

north bank of the Mud River. The Old Road ran immediately past this log home and proceeded due north to the Newman Property. Tr. Tran. p. 38; 89–90; 129–130.

For over fifty (50) years, the Old Road served as the only known route by which Appellants' ancestors accessed the Newman Property, and it was used openly and without permission. Tr. Tran. p. 53–56. Appellants' family farmed the Property, producing cash crops including tobacco. Tr. Tran. p. 21 at 18–22. Appellants' family also raised other crops on the Property for their own personal consumption and hunted game. Tr. Tran. p. 21–24. The original Newman family farmhouse stood on the Newman Property until 1975, at which time it was destroyed by fire. Tr. Tran. p. 22 at 16.

In 1940, title to the Newman Property was held by Ida Newman, Appellants' paternal grandmother, who lived on the Property from the early 1890's until the mid 1950's. Tr. Tran. p. 12 at 11–12. In that year, because of reoccurring high water along the Mud River, Appellants' uncle and Ida Newman's son, T.M. Newman, purchased from one of Appellees' predecessors in interest, Gladys and Cyril Elwell, a second easement ("T.M. Newman Easement"). Tr. Tran. p. 21 at 5–9; 55 at 22–24; 56 at 1–14. The parties executed a deed, which was recorded in the land record of Cabell County. The deed specifically provided for an "easement or right of way for road purposes only" across the Elwell property. Tr. Tran. Defendants' Ex. 1.[2] At the time he purchased this second Easement, T.M. Newman was living on the Newman Property, as he did so for his entire life. Tr. Tran. p. 13 at 6–7.

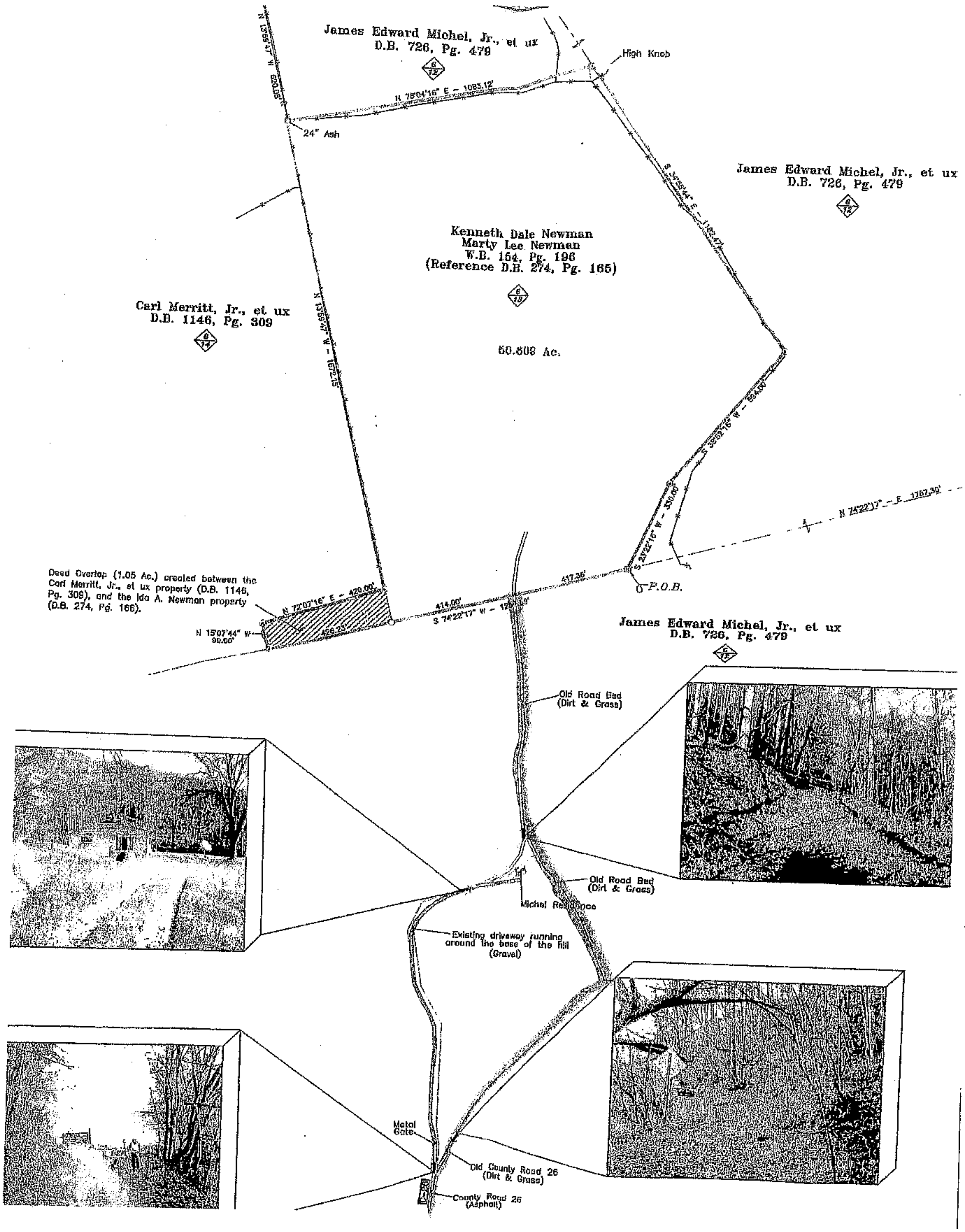
The T.M. Newman Easement, like the Old Road, was accessed from County Road 26, but its entry point was located west of that of the Old Road. The T.M. Newman Easement was

[2]Gladys Marie Short Elwell, the original grantor of the T.M. Newman Easement, conveyed her property to R.K. Woodall and Ida Woodall on October 13, 1945. The Woodalls conveyed the property to John Hager and Mabel Hager on July 12, 1947. The Hagers, in turn, conveyed the property to Gary and Emma Fletcher on November 18, 1947. Finally, Emma Fletcher conveyed the property to Appellees on May 14, 1973. Each conveyance was taken subject to the T.M. Newman Easement. Tr. Tran. Plaintiffs' Ex. 3.

approximately 980 feet in length and its course ran from County Road 26 northeast through the Elwell's property, to a point where it merged with the original Old Road. From that point, the Old Road continued in a north-south direction another approximate 900 feet to the border of the Elwell and Newman Property. Tr. Tran. p. 13; 22 at 20–23; 56 at 10–14; 98–99; 105–106; See also Plaintiffs' Ex. 2; and Defendants' Ex. 1. The T.M. Newman Easement was, in effect, an alternate way for Appellants' ancestors to gain access to the existing original Old Road, which provided the ingress/egress to the Newman Property. Importantly, the T.M. Newman Easement Agreement expressly recognized that the T.M. Newman Easement connected with the "20 foot road easement now in use". See Tr. Tran. Defendants' Ex. 1. This 20 foot road easement reference in the Agreement is the original Old Road. Tr. Tran. p. 53–54; 98–99; See also Defendants' Ex. 1. Appellee, James Michel, conceded the existence of the original Old Road and was not able to dispute or challenge the Appellants' right to use the same to access their property.[3] In 1946, T.M. Newman unexpectedly died, predeceasing Ida Newman by some twelve (12) years.

In order to aid the Circuit Court in understanding the "lay of the land" at issue, Appellants admitted into evidence a survey detailing the Appellants' landlocked property, the Appellees' property, the T.M. Newman Easement and a portion of the original Old Road. Tr. Tran. Plaintiffs' Ex. 2. Appellants herein include a partial reduced version of the survey for this Honorable Court's immediate convenience:

[3]Appellee James Michel testified that after he acquired his property subject to the T.M. Newman Easement and the Old Road in 1973, he granted permission to Appellants to use the T.M. Newman Easement. Regarding the original Old Road, however, there is no evidence in the record that he denied or challenged the Appellants' right to its use. To the contrary, Mr. Michel essentially testified that he did not know whether Appellants had a right of way across the Old Road: "Q: And its always been your position that the Newman family did not have a right-of-way up over your property and up the hill?; A: They did not have a right of way up my driveway. Q. Nor up the hill. A. I don't know the legal interpretation up the hill." Tr. Tran. p. 18 at 18–23.


James Edward Michel, Jr., et ux
D.B. 726, Pg. 479
High Knob
24" Ash
James Edward Michel, Jr., et ux
D.B. 726, Pg. 479
Kenneth Dale Newman
Marty Lee Newman
W.B. 154, Pg. 196
(Reference D.B. 274, Pg. 165)
Carl Merritt, Jr., et ux
D.B. 1146, Pg. 309
Deed Overlap (1.05 Ac.) created between the Carl Merritt, Jr., et ux property (D.B. 1146, Pg. 309), and the Ida A. Newman property (D.B. 274, Pg. 165).
P.O.B.
James Edward Michel, Jr., et ux
D.B. 726, Pg. 479
Old Road Bed (Dirt & Grass)
Old Road Bed (Dirt & Grass)
Michel Residence
Existing driveway running around the base of the hill (Gravel)
Metal Gate
Old County Road 26 (Dirt & Grass)
County Road 26 (Asphalt)

The foregoing survey, from the bottom of the page, details a portion of County Road 26 and the T.M. Newman Easement, which travels from County Road 26 due north across Appellees' property and thereafter, in a hooking fashion, east to a point where it connects with the original Old Road. From this point, the diagram shows the Old Road continuing across the Appellees' property to the Appellants' property line. The T.M. Newman Easement is labeled "Existing driveway running around the base of the hill," while the original Old Road is labeled "Old Road Bed." Although the diagram suggests that the Old Road ended just south of the point where the T.M. Newman Easement merged with it, the Old Road, in fact, continued south to County Road 26 and the Mud River. Tr. Tran. p. 16–17; 98–99; 129–130. For convenience, Appellants' counsel has outlined in "pink" the general course of the original Old Road to the point where it connected with County Road 26. The general course of County Road 26 between the access points to the Old Road and the T.M. Newman Easement has been outlined in "orange." As discussed, *infra*, the portion of County Road 26 from which Appellants had access to the Old Road became impassable in the late 1970's and eventually was closed.

After purchase of the T.M. Newman Easement in 1940, the Appellants and their ancestors used both the T. M. Newman Easement and the Old Road to access the Newman Property. By approximately 1959 or 1960, primarily out of convenience, the T.M. Newman Easement access essentially replaced the Old Road access as Appellants' primary means of ingress/egress to the Property.[4] Tr. Tran. p. 21 at 10–13; 57 at 5–7. Throughout the 1960's, Appellants and their father regularly used the T.M. Newman Easement to connect with the Old Road to the Newman Property for farming and recreation. Tr. Tran. p. 21–25; 90–93. In the spring through fall months, Appellants traversed the T.M. Newman Easement to the Old Road

[4] Appellants and their father, Hugh Newman, moved to Barboursville, West Virginia in approximately 1955. As a result of this move, the T.M. Newman Easement became the closest and most convenient way for Appellants to access the Newman Property. Tr. Tran. p. 16–17.

approximately two to three times a week to work in the family gardens. Tr. Tran. p. 21–25; 65–66. They also regularly accessed the Property via the T.M. Newman Easement during other parts of the year for hunting and recreation. Tr. Tran. p. 21; 25–26. From as early as 1958, Appellants and their family drove motor vehicles across the T.M. Newman Easement and continued up the Old Road to the Newman Property. Tr. Tran. p. 23–24, 28–32. Appellants' father maintained the T.M. Newman Easement and continued to tend his gardens and work the Property until falling ill in 1973. Tr. Tran. p. 26–27; 30–31.

In or about 1963, Appellees' immediate predecessor in title, Emma and Gary Fletcher, abandoned the original log home on their property at the junction of the Old Road and County Road 26 and built a new home at a point near the location where the T.M. Newman Easement and the Old Road merged. Tr. Tran. p. 18–19; Plaintiffs' Ex. 2. The Fletchers, in fact, actually constructed their home across the T.M. Newman Easement. Id. The Appellees currently reside in this house and the location of the same is marked on the reduced survey map, *supra*, as "Michel Residence." See also, Tr. Tran. Plaintiffs' Ex. 2. As a result of the location of the house, a by-pass "spur" developed from the T.M. Newman Easement around the left of the Fletcher house to the Old Road. Tr. Tran. p. 18–19. After 1963, Appellants regularly used the "spur" to access the Old Road in lieu of that portion of the T.M. Newman Easement that has been blocked by the new Fletcher home. There is no evidence in the record that the Fletchers either permitted Appellants' father to create this "spur" or otherwise granted or challenged its use. Tr. Tran. p. 19. Again, for the Court's convenience, the "spur" from the T.M. Newman Easement around the Michel residence to the Old Road has been highlighted in "yellow" on the survey map, *supra*.

On May 14, 1973, Appellees purchased from Emma Fletcher the real property subject to the T.M. Newman Easement and the Old Road. Tr. Tran. p. 111–112. At the time of purchase, Appellees were not only aware that the T.M. Newman Easement was in their deed but also were aware that the Old Road had been the original access to the Newman Property from County Road 26. Tr. Tran. p. 111–112; 129–130. See also Plaintiffs' Ex. 3 May 14, 1973 Fletcher/Michel Deed. Soon after Appellees' purchase, Appellant Marty Newman overheard a conversation between his father, Hugh Newman, and Appellee James Michel regarding the T.M. Newman Easement. Specifically, Appellants' father planned to bring equipment across the T.M. Newman Easement in order to perform road maintenance on the Newman Property. Mr. Michel, in the presence of Appellant Marty Newman, informed Appellants' father that the Newmans did not have an easement across his property. Appellants' father disagreed, and thereafter, he and Appellants continued to access the Property via the T.M. Newman Easement and Old Road until his death in 1974. Tr. Tran. p. 95–96. Appellee Mr. Michel confirmed a similar conversation with Hugh Newman regarding the T.M. Newman Easement. Tr. Tran. p. 131–132.

Prior to this confrontation with Appellee Mr. Michel, Appellants had never been denied or refused access to their Property via the T.M. Newman Easement or the Old Road. Further, Appellants did not believe they needed permission to use the T.M. Newman Easement or Old Road, as they understood they had an express right to do so. Tr. Tran. p. 19; 63–64; 97 at 2–21; 104 at 13–17. In 1974, Hugh Newman died leaving the Property to Appellants' mother, Viola Newman. Tr. Tran. p. 36.

Soon after Hugh Newman's death, Appellee James Michel parked a vehicle across the T.M. Newman Easement blocking access to the "spur" around the Michel house. Appellant Kenneth Newman, on behalf of his mother and the Newman family, spoke with Mr. Michel

regarding the placement of this vehicle. Mr. Michel informed Appellant Ken Newman that they did not have a right of way across his land, and he was not going to move the vehicle. Tr. Tran. p. 33–36; 95–96. Despite the T.M. Newman Easement being blocked by the vehicle, Appellants continued to access the Newman Property via the T.M. Newman Easement by parking their vehicles at the point where Mr. Michel's car had blocked the same, and thereafter walking along the T.M. Newman Easement, the "spur," and the Old Road to the Newman Property. Tr. Tran. p. 34–35. Later, Appellants discovered Appellees' vehicle had been moved, but that an electric wire fence had been erected across the T.M. Newman Easement. Despite this fence, Appellants continued to regularly access their Property by walking the T.M. Newman Easement, the "spur," and the original Old Road. Tr. Tran. p. 34–37.[5]

In approximately 1977, a portion of County Road 26 was closed by the State of West Virginia due to road deterioration. The point of access to the original Old Road was located within the section of road that was closed. Further, Appellees erected a wire fence across County Road 26 at the point where the road was closed. Eventually the road itself fell away into the Mud River. As a result, from approximately 1977 onward, any attempt by Appellants to access the Old Road from County Road 26 was impossible, leaving the T.M. Newman Easement access the only means of access to the Newman Property. Tr. Tran. p. 38–39; 60–61; 112–113; 126–128.

Appellants estimate that from the time the Appellees first challenged their right to use the T.M. Newman Easement in 1975, they continued to use the Easement approximately seven (7) to fourteen (14) times per year until approximately 2003. Tr. Tran. p. 49. In 2003, Appellants

[5] Appellee James Michel testified that he had parked a vehicle on at least one occasion across the T.M. Newman Easement but that he moved the car after receiving a letter from an attorney on behalf of Appellants' family. Michel further testified that he never intended to deprive Appellants of access to their Property and moved the vehicle. Tr. Tran. p. 119–121; 132–133.

discovered that Appellees had locked a gate located at the entrance of the T.M. Newman Easement approximately where it intersects with County Road 26. Tr. Tran. p. 37.[6] Appellants thereafter filed the underlying action to vindicate their right to access the Property. Tr. Tran. p. 10 at 12–14. At trial, Appellee James Michel refused any further use by Appellants of the T.M. Newman Easement. Tr. Tran. p. 123. Appellants, no longer having the option of accessing the original Old Road from County Road 26 due to road deterioration, and having been prevented from their rightful use of the T.M. Newman Easement by the Circuit Court's erroneous rulings, are now completely barred from accessing their Property.

III. Assignments of Error[7]

A. The Circuit Court Erred by Admitting the Hearsay Testimony of Appellee James Michel.

B. The Circuit Court Erred in Finding Appellants' Post 1946 use of the Easement Permissive.

C. The Circuit Court Erred in Finding that Appellants do not have a Prescriptive Easement.

D. The Circuit Court Erred in Finding that the T.M. Newman Easement was in Gross.

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[6] Appellee Mr. Michel testified he locked a gate where the T.M. Newman Easement connects with County Road 26, but did so not to prevent the Appellants access to the Newman Property, but rather to protect his property. Tr. Tran. p. 113–114; 133–134.

[7] Although the issue was not directly raised in the underlying action, Appellants are entitled by necessity to traverse across the T.M. Newman Easement. The trial record is clear that the original Old Road access from County Road 26 to the Newman Property existed from the time the Newman family acquired the Property in the late 1800's. The Old Road easement also was recognized by all of the witnesses who testified at trial. Moreover, the Old Road easement actually appears in the T.M. Newman Easement agreement. See Tr. Tran. Defendants' Ex. 1 (stating that the T.M. Newman Easement connects with the "centerline of the 20 foot road easement now in use"). After a portion of County Road 26 was closed due to road deterioration and high water in approximately 1977, the Appellants no longer had an option of accessing the Old Road from its County Road 26 access point. As such, by necessity, Appellants must have right of access across the T.M. Newman Easement in order to connect with the original Old Road easement. Appellants therefore suggest and maintain that this Court already has before it the facts which support Appellants' right of necessity across the T.M. Newman Easement.

IV. Points and Authorities Relied Upon and Discussion of Law

A. Standard of Review

The underlying case was tried to the bench. Therefore, in reviewing challenges to a Circuit Court's findings and conclusions, a two prong deferential standard of review is applied. The Final Order and the ultimate disposition are reviewed under an abuse of discretion standard, while the Circuit Court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review. Syl. pt. 1, Public Citizen, Inc. v. National Bank of Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996).

All evidentiary rulings are subject to an abuse of discretion standard. Syl. pt. 10, State v. Huffman, 141 W. Va. 55, 87 S.E.2d 541 (1955), overruled on other grounds by State ex rel. R.L. v. Bedell, 192 W. Va. 435, 452 S.E.2d 893 (1944) ("[t]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion."). See also, Syl. pt. 7, State ex rel Weirton Medical Center v. Mazzone, 214 W. Va. 146, 587 S.E.2d 122 (2002). Error in an evidentiary ruling is prejudicial and ground for reversal when such ruling affects the final outcome and works adversely to a substantial right of the party assigning it. Reed v. Weimar, 195 W. Va. 199, 465 S.E.2d 100 (1995); see also W. Va. R. Evid. 103(a) ("error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the parties affected"); see also W.V.R.Civ.P. 61 ("the court ... must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

This Court has previously recognized that a Circuit Court's discretion is not without limitation and may be checked where appropriate. Foster v. Sakhai, 210 W. Va. 716, 722, 559 S.E.2d 53, 59 (2001) ("when we find that the lower court has abused its discretion, we will not

hesitate to right the wrong that has been committed."); see also State v. Hedrick, 204 W. Va. 547, 553, 514 S.E.2d 397,403 (1999) (noting the reviewing court "will not simply rubber stamp the trial court's decision when reviewing for abuse of discretion."). The "abuse of discretion" standard of review "occurs when a material factor deserving a significant weight is ignored, when an improper factor is relied upon, or when all proper or no improper factors are assessed that the Circuit Court makes a serious mistake in weighing them." Gentry v. Magnum, 195 W. Va. 512, 520, n.6; 466 S.E.2d 171, 179 n.6 (1995).

B. Legal Argument

The Circuit Court committed four reversible errors: (A) The Circuit Court admitted and relied upon, to the substantial prejudice of Appellants, the hearsay testimony of Appellee James Michel; (B) The Circuit Court erred by finding Appellants' post 1946 use of the T.M. Newman Easement permissive; (C) The Circuit Court erred by not finding that Appellants had a prescriptive easement across the T.M. Newman Easement; and (D) The Circuit Court erred in ruling the T.M. Newman Easement an easement in gross. Each of these errors significantly prejudiced Appellants and should be reversed and/or overruled by this Honorable Court.

1. The Circuit Court Erred by Admitting the Hearsay Testimony of Appellee James Michel.

The Circuit Court abused its discretion and committed reversible error by admitting and relying upon hearsay testimony regarding the alleged permissive use of the T.M. Newman Easement and "spur," which provided Appellants' access to the Old Road. At trial, Appellee James Michel testified regarding an alleged conversation he had with Mrs. Fletcher, the then owner of the property over which the Easement traverses. Specifically, Mr. Michel alleges that before he purchased his property in 1973, he had the following discussion with Mrs. Fletcher, who is now deceased, regarding the T.M. Newman Easement:

Q. Back when you were considering buying this property did you take any steps to meet with Hugh Newman?

A. We went over and talked to Hugh Newman and tried to buy his property for $5,000.00.

Q. Was that before or after you had already purchased your land?

A. Before we purchased our land.

Q. And why is it that you met with Mr. Newman?

A. **Because we were in a discussion about Mrs. Fletcher said the Newmans were allowed to use her driveway.** We were concerned about a right-of-way, and then with what was in our deed, we went over there to talk to Hugh Newman to avert a possible lawsuit for this.

Q. Lawsuit –

A. **Even though she said the Newmans do not have a valid right-of-way.**

Tr. Tran. p. 115 (emphasis added).

Trial Counsel for the Appellants objected to the testimony regarding the alleged conversation and Mrs. Fletcher's purported comments about the T.M. Newman Easement as hearsay, whereupon the Circuit Court recognized a continuing objection. Tr. Tran. p. 115–116. Having permitted Mr. Michel's testimony regarding Fletcher's out of court statements, Appellants' trial counsel was forced to cross-examine Mr. Michel on the subject:

Q. I want to make sure that I understand what you're telling me here. When you purchased the property from the Fletchers in 1973, you had concerns about a possible right-of-way, did you not?

A. **She said that they did not have a right-of-way,** but I am spending a lot of money, I'm concerned.

Q. **She said they didn't have a right-of-way?**

A. **Right.**

Q. **Did you ask her whether they had a right-of-way?**

A. **She said they didn't have one.**

Q. At the time, did you know anything about the T.M. Newman agreement?

A. I went over to talk to -- she told us to go over there and offer them $5,000 if we were concerned about a right-of-way. When I went over there and talked to Mr. Newman, Ken and Marty's father, he waived a piece of paper at me and said it was his right-of-way ...

Q. Okay. And this was of great concern to you, was it not?

A. Anytime you're buying property for the price we paid for the property, your concerned about any right-of-way.

* * *

Q. Okay, but my question is, is you were very specific when you inquired of Mrs. Fletcher. You said ... one of the things you told me was that Mrs. Fletcher first told you that they were using the driveway. Do you recall using that?

A. That the Newmans were using the driveway?

Q. Yes.

A. **Yeah. She said she permitted the Newmans to use the driveway. She gave them permission.**

Q. And she didn't tell you how long?

A. **She just said they have my permission to use the driveway.**

Tr. Tran. p. 123–125; 130 (emphasis added).

Rule 802 of the West Virginia Rules of Evidence mandates "[h]earsay is not admissible except as provided by these rules." W. Va. R. Evid. 802 (2006). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." W. Va. R. Evid. 801(c) (2006). Hearsay is generally considered to be untrustworthy because the out of court declarant cannot be cross-examined concerning the accuracy of the statement. State v. Browning, 199 W. Va. 417, 485

S.E.2d 1 (1997). Hearsay testimony not falling within any exception recognized by the West Virginia Rules of Evidence is inadmissible. State v. Welker, 178 W. Va. 47, 357 S.E.2d 240 (1987); State v. Sutphin, 195 W. Va. 551, 466 S.E.2d 402 (1995).

This Court addressed the issue of hearsay in a right of way/easement dispute in Keller v. Hartman, 175 W. Va. 418, 333 S.E.2d 89 (1985). In Keller, an incompetent landowner, through committee, instituted a civil action against a co-tenant's lessee seeking to declare null and void the co-tenant's conveyance of a right of way to the lessee. The lessee asserted it had acquired the right of way either by grant from the co-tenant or through prescription. In rebuttal, a witness was offered to testify about a conversation with the incompetent landowner wherein the landowner stated he neither consented to nor acquiesced in the granting of a right-of-way to the lessee. Objection was made on the basis of hearsay and, after counsel vouched the record, the Circuit Court sustained the objection. On appeal, this Court found no error in the Circuit Court's decision to strike the witness' testimony on hearsay grounds since it "clearly was inadmissible." Keller, 175 W. Va. at 424, 333 S.E.2d at 95, citing Salerno v. Manchin, 158 W. Va. 220, 213 S.E.2d 805 (1974).

As was the case in Keller, Appellee James Michel's testimony regarding what Mrs. Fletcher purportedly told him about the permissive nature of the Newmans' use of the Easement squarely falls within the definition of inadmissible hearsay under Rules 801(c) and 802. First, Mr. Michel's testimony as to what Mrs. Fletcher told him in 1973 are obviously statements made by someone other than Michel. Second, the testimony was offered into evidence for the truth of the matter asserted; i.e., to establish not only that Mrs. Fletcher allegedly disputed the recorded easement in her deed, but also that she had given Appellants permission to use the T.M. Newman Easement. Finally, the hearsay testimony does not fall within any recognized hearsay

exceptions. Even Mr. Michel himself, although a layman, conceded he had no personal knowledge of Appellants' use of the T.M. Newman Easement prior to his acquisition of the property in 1973, and that what Mrs. Fletcher had told him about Appellants' use was hearsay.[8]

The Fletcher hearsay statements cannot be dismissed as trivial, irrelevant, or harmless because these statements were expressly relied upon by the Circuit Court in its findings of fact and in its conclusions of law. Moreover, these hearsay statements serve as an integral part of the Circuit Court's ruling that the Appellants' use of the Easement was permissive. Only a cursory review of the Circuit Court's Final Order is necessary to understand the deference and substantial weight that was given to the hearsay testimony. In its findings of fact, the Circuit Court recognized "...Michel testified that Mrs. Fletcher indicated she had given permission to the Newman family to use the driveway to access the farm road to their property." Cir. Ct. Final Order, *Findings of Fact*, ¶ 47. Further, the Circuit Court in its conclusions of law accepted "that the defendants relied on representations by Emma Fletcher that there was no Newman right of way or easements over their driveway at the time of purchase." Cir. Ct. Final Order, *Conclusions of Law*, ¶ 15. Finally, the court held "that the clear language of the 1940 T.M. Newman agreement established a permissive easement over the lands and current driveway of the defendants and that permission continued without interruption until the Fletchers sold the property to the defendants in 1973." Cir. Ct. Final Order, *Ruling of the Court,* first paragraph.

The admission of the Appellee's hearsay testimony and the Circuit Court's reliance upon it is highly prejudicial to the Appellants and should not have been considered. As more fully discussed, *infra*, the Circuit Court ruled on motion for summary judgment prior to trial that the

[8] Upon cross-examination, Mr. Michel testified, in part: "Q. Prior to 1973, what knowledge did you have of the Fletcher property? A. We had no knowledge probably prior to '73 .... Q. Would it be fair to say, then ... you have no knowledge as to how the Newmans access (sic) their property for (sic) 1960 to 1973? A. From 1960 to 1973, we talked to Mrs. Newman. It's hearsay what Mrs. Fletcher told us ... ." Tr. Tran. p. 129.

T.M. Newman Easement was in gross, which terminated with the death of T.M. Newman in 1946. Based upon this ruling, it follows that any use of that easement after the death of T.M. Newman, *absent permission*, must be construed as hostile. Yet the only evidence in the trial record regarding Appellants' permissive use of the Easement between 1946 and 1973, the date Appellees acquired their property, is the inadmissible hearsay testimony of Mr. Michel. Reliance by the Circuit Court on the hearsay testimony is an obvious abuse of discretion. In essence, the Circuit Court accepted as true Appellee's self-serving recitation of the alleged words of Mrs. Fletcher, while ignoring the most credible evidence concerning the T.M. Newman Easement—the deed record in Appellees' chain of title, and the testimony of Appellants and witnesses who appeared and testified.

The deed record, prior to the Circuit Court finding the express T.M. Newman Easement null and void, establishes that the Fletchers acquired the property in 1947 subject to the T.M. Newman Easement. The Fletchers later conveyed the same property to Appellees on May 14, 1973 subject to the same T.M. Newman Easement. The decision to accept as truth the hearsay testimony of Appellee essentially permitted the Circuit Court to ignore the fact that the Fletchers took title to their property subject to the express T.M. Newman Easement. Absent the hearsay statements, there is no evidence that Mrs. Fletcher disputed that her property was subject to a valid Easement or otherwise challenged the Appellants' belief that they had a bona fide right to use the Easement.

Following closing arguments, the Circuit Court acknowledged that as result of its dual role of judge and jury in the bench trial, it had been "a little loose with the hearsay rules, but in deciding the weight to be given that testimony, I may not be as loose." Tr. Tran. p. 145 at 1–8. Unfortunately, the Circuit Court continued with its "loose" interpretation of the West Virginia

Rules of Evidence and erred in admitting and relying upon the inadmissible testimony of Appellee Mr. Michel to the substantial prejudice of Appellants. As such, this Court should reverse the Circuit Court's finding that Appellants' and their family's use of the T.M. Newman Easement and "spur" to access the Old Road between 1946 and 1973 was permissive.

2. The Circuit Court Erred in Finding Appellants' Post 1946 use of the Easement Permissive.

The Circuit Court erred in finding Appellants and their ancestors' post 1946 use of the T.M. Newman Easement permissive. The Circuit Court relied on Faulkner v. Thorn, 122 W. Va. 323, 9 S.E.2d 140 (1940) for the proposition that that once permission is given by the owner of a parcel, such permission will continue unless otherwise revoked or renounced with continued use, or if there is an act indicating a hostile or adverse claim. The Circuit Court, quoting Jamison v. Waldeck United Methodist Church, 191 W. Va. 288, 292, 445 S.E.2d 229, 233 (1994) stated:

> "the use of a way over the land of another, permissive in its inception, will not create an easement by prescription no matter how long the use may be continued, unless the licensee, to the knowledge of the licensor, renounces the permission and claims the use as his own right, and thereafter uses the way under his adverse claim openly, continuously and uninterruptedly, for the prescriptive period."

The Circuit Court's Order found Appellants failed to produce clear and convincing evidence that they or their predecessors in interest rejected the permissive use of the T.M. Newman Easement that would cause the Circuit Court to conclude Appellants' use was prescriptive rather than permissive.

The Circuit Court's reliance upon Faulkner and Jamison is misplaced. In each case, the use of the easement at issue began as permissive and no evidence was introduced to show the permissive use was renounced or revoked. Unlike the claimants in Faulkner and Jamison, Appellants and their ancestors' use of the T.M. Newman Easement began as a right under a written easement, not merely as permissive use. Appellants do not have the continued

permissive use of the T.M. Newman Easement as described in Faulkner and Jamison, because Appellants and their ancestors used the T.M. Newman Easement under a bona fide right. Consequently, Appellants and their ancestors believed they did not need, nor would they have sought permission to use the T.M. Newman Easement of Appellees, or of any of Appellees' predecessors in interest.

The deed record clearly supports Appellants' use of the T.M. Newman Easement as being under a bona fide claim of right. From the original grant of the T.M. Newman Easement in 1940, the Easement passed through four conveyances in Appellees chain of title, down to the Appellees. Appellees took their property subject to the T.M. Newman Easement. Appellees, however, can offer no evidence, other than the hearsay testimony of Appellee Mr. Michel, that any party challenged the legitimacy of the T.M. Newman Easement or Appellants' and their ancestors' use of it. Moreover, Appellee Michel's offer to purchase Appellants' property for $5,000.00 because of a claimed right of way prior to his purchase of the Fletcher property belies his contention that he understood Appellants' use to be permissive. Finally, there is no evidence of any attempt to contest the T.M. Newman Easement in Court, or to deny the Newman's access to their property until Appellees acted after 1973 to impede access.

The trial record also clearly supports Appellants' belief that their use of the T.M. Newman Easement was rightful at its inception rather than permissive.[9] Appellant Kenneth Newman testified that the Fletchers never gave Hugh Newman permission to use the T.M. Newman Easement, and that his father traveled the Easement openly. Tr. Tran. p. 19 at 12–24. Kenneth Newman also testified that the Fletchers never denied anyone access to the Property via

[9] The legal distinction between rightful and permissive use is significant. A right is "a legally enforceable claim that another will do or will not do a given act;" ... "a recognized and protected interest the violation of which is wrong." Black's Law Dictionary, 7th Ed. p. 1322. By contrast, permission is "[T]he act of permitting, or a license or liberty to do something; authorization." Black's Law Dictionary, 7th Ed. p. 1160. "Permission involves leave and license but it gives no right." Atlantic Greyhound Corp. v. Newton, 131 F.2d 845, 847 (4th Cir. 1942).

the T.M. Newman Easement, and never granted him permission to use the T.M. Newman Easement. Tr. Tran. p. 28 at 1–8. Appellant Marty Newman testified the Fletchers never refused any Newman family member permission to access the Newman Property, nor does he have a memory of having been specifically granted permission. Tr. Tran. p. 96–97. Margie Phillips, Appellants' sister, testified she has no memory of any of the Fletchers ever denying access to the Newman Property, or any discussion about receiving permission to utilize the T.M. Newman Easement to the Property. Tr. Tran. p. 68. Ms. Phillips also testified she never felt they needed permission to use the Fletchers' property to access the Newman Property. Tr. Tran. p. 70.

Appellants' and their ancestors' failure to ask for permission to use the T.M. Newman Easement, and the Fletchers not granting such permission to do so, is consistent with the understanding of the parties that Appellants had a right to use the T.M. Newman Easement. Permissive use by Appellants and their family cannot be implied simply because the Fletchers never objected to Appellants' use of the T.M. Newman Easement. The mere sufferance or failure to object to another's presence upon the property of another is insufficient within itself to constitute a license to do so, unless that permission is inferred under the circumstances. See Waddell v. New River Company, 141 W. Va. 880 883–84, 93 S.E.2d 473, 476 (1956). The Circuit Court's decision to conclude as a matter of law that Appellants' use of the T.M. Newman Easement was permissive in the face of overwhelming evidence to the contrary has substantially prejudiced Appellants and is clearly reversible error.

Even assuming arguendo that the Circuit Court was correct in its ruling that the express grant of the T.M. Newman Easement was permissive at its inception, the Circuit Court erred in its application of its own order to the facts of this case. The Circuit Court found that the permissive use of the T.M. Newman Easement, granted to T.M. Newman in 1940 was personal

to him and terminated when he died in 1946. The Circuit Court then erred by improperly placing upon Appellants the burden of establishing that they or their ancestors had renounced after 1946 permissive use of the T.M. Newman Easement as a predicate to establishing a prescriptive easement.

The Circuit Court Order eliminated Appellants' and their ancestors' permissive use of the T.M. Newman Easement and the correct legal effect of the order is to make any post 1946 use of the T.M. Newman Easement by Appellants and/or their ancestors hostile. Without right or permission to use the T.M. Newman Easement, Appellants and other members of the Newman family who did so after 1946 were trespassers. "A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in performance of any duty of the owner." Syl. pt. 1 Huffman v. Appalachian Power Company, 187 W. Va. 1, 2, 415 S.E.2d 145, 146 (1991); Syl. pt. 3, Brown v. Carvill, 206 W. Va. 605, 606, 527 S.E.2d 149, 150 (1998); citing Syl. pt. 1 Huffman, 187 W. Va. at 2, 415 S.E.2d at 146. See also 65A C.J.S. Negligence § 407 ("The termination of a license to use property renders the licensee a trespasser as to any use thereafter."); Quintain Development, LLC v. Columbia Natural Resources, Inc., 210 W. Va. 128, 556 S.E.2d 95 (2001) citing Restatement of Property § 451, at 2911–12 (providing that "[a]n affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do," and commenting that "[i]n many cases, the use an owner of an affirmative easement is entitled to make enables him to intrude upon the land subject to the easement in ways which, were it not for the easement, would make him a trespasser upon the land."); Evans v. Carter Coal Co., 121 W. Va. 493, 5 S.E.2d 117, 118 (1939) (licensee who is on licensor's property where licensee is not reasonably expected to be is

trespasser); and Bryan v. Big Two Mile Gas Company, 213 W. Va. 110, 119, 577 S.E.2d 258, 267 (2001) (tenant wrongfully holding over can be treated by landlord as trespasser).

Because the Circuit Court revoked as of 1946 any right Appellants and/or their ancestors had to use the T.M. Newman Easement, there was no need for Appellants to establish that they or their ancestors renounced permissive use. Rather, the Circuit Court should have determined if Appellants produced clear and convincing evidence that they had met the elements to establish a prescriptive easement. When Appellee Mr. Michel's self serving hearsay testimony is disregarded, it is clear Appellants have established a prescriptive easement over the T.M. Newman Easement and the "spur" to the point where they join with the Old Road.

3. The Circuit Court Erred in Finding that Appellants do not have a Prescriptive Easement.

In order to establish a prescriptive easement, the use of a private way over the land of another must be continuous and uninterrupted for a period of ten years under a bona fide claim of right, adverse to the owners of the land, and with the owners' knowledge and silence. Berkley Development Corp. v. Hutzler, 159 W. Va. 844, 849, 229 S.E.2d 732, 735 (1976). See also Law v. Monongahela Power Company, 210 W. Va. 549, 559 n.13, 558 S.E.2d 349, 359 n.13 (2001); and Town of Paden City v. Felton, 136 W. Va. 127, 137, 66 S.E.2d 280, 286 (1951). "The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof." Syl. pt. 10 Law v. Monongahela Power Co., 210 W. Va. 549, 552, 558 S.E.2d 349, 352 (2001). Thus, the following elements must be satisfied to establish the existence of a prescriptive easement: (a) use of a private way over the land of another; (b) continuous and uninterrupted use for ten (10) years; (c) use under a bona fide claim of right adverse to the owners of the land; (d) use with the knowledge and silence of the owners of the land. In addition, as discussed below, the party seeking to establish a prescriptive easement may

also be required to show its right to use of the easement is exclusive. As shown below, Appellants established at trial each element required to establish a prescriptive easement.

a. Use of Private Way over the Land of Another

Appellants and their ancestors have been using a private way over Appellees' property since 1941 under rights granted by the T.M. Newman Easement. Appellants' use of this private way over the land of another was at issue in Circuit Court and is the subject of this appeal.

b. Continuous and Uninterrupted Use for Ten Years

Appellants' testimony clearly establishes that Appellants and their ancestors used the T.M. Newman Easement continuously and uninterrupted for a continuous ten year period that began at latest in 1958, when Appellants' father, Hugh Newman, obtained sole interest in the Newman Property, and lasted until 1973 when Appellees purchased their property from the Fletchers.[10] Appellant Kenneth Newman testified that he used the Easement to access the Property for ten continuous years. Tr. Tran. p. 63, 17–23. Kenneth Newman also testified they utilized the Easement two to three times a week during growing season to access the Property. Tr. Tran. p. 21 at 5–18.

c. Use under a *Bona Fide* Claim of Right Adverse to Owners of the Land

Appellants' use of the T.M. Newman easement is under a bona fide claim of right via the conveyance and deed for the T.M. Newman Easement. Tr. Tran. Defendants' Ex. 1. The T.M. Newman Easement Agreement was recorded in the land records of Cabell County until the

[10] Proper application of the Circuit Court's Order, that the T.M. Newman Easement was in gross and died with T.M. Newman in 1946, arguably means the prescriptive period commenced in 1946. Appellants' paternal grandparents, Ulysses and Ida Newman, lived on the Newman Property from the 1890's to the 1950's. Appellants' parents also resided briefly on the Property in the 1940's and Appellant Ken Newman was born on the property in 1947. Appellants' father acquired sole title to the Newman Property in 1958 from his mother and his siblings. After the late 1950's, Appellants' uncle, Steve Newman, periodically resided on the Property until his death in 1973. Appellants' mother, Viola Newman, acquired title to the Newman Property upon the death of her husband, Hugh Newman, in 1974. Appellants Ken and Marty Newman acquired joint title to the Property upon the death of their mother in 2000. While no member of the Newman family physically resided on the Property after 1973, it is almost certain that Appellants and their ancestors used the T.M. Newman Easement after 1946 and before 1958.

Circuit Court ordered it stricken in its Final Order. Appellant Ken Newman testified that he believed the T.M. Newman Easement gave his family a right to access their Property, and that is why he continued to use the Easement. Tr. Tran. p. 63 at 14–21; 74 at 8–9.

d. Use with Knowledge and Silence of the Owners of the Land

Appellants' testimony cited above establishes by clear and convincing evidence that the Fletchers, Appellees' predecessors in interest during the prescriptive period, were aware of Appellants' use of the T.M. Newman Easement and never objected to it. Appellant Ken Newman testified that the Fletchers never gave Hugh Newman permission to use the Easement, and that his father traveled the Easement openly. Tr. Tran. p.19 at 12–24. Ken Newman also testified that the Fletchers never denied anyone access to the Property via the Easement, and never granted him permission to use the Easement. Tr. Tran. p. 28 at 1–8. Appellant Marty Newman testified the Fletchers never refused any Newman family member permission to access their property, nor does he have a memory of having been specifically granted permission. Tr. Tran. p. 96–97. Margie Phillips, Appellants' sister, testified she has no memory of any of the Fletchers ever denying access to the property or any discussion about receiving permission to utilize the T.M. Newman Easement. Tr. Tran. p. 68. Ms. Phillips also testified she never felt they needed permission to use the Fletchers' property to access the Newman Property. Tr. Tran. p. 70. Finally, Appellee Michel's testimony that he granted Appellants permission to use the Easement is irrelevant, as it occurred after the prescriptive period.

e. Exclusivity

West Virginia jurisprudence indicates that in certain cases, considering whether a claimant has established a prescriptive easement, "[t]he further condition that the user must be exclusive is *sometimes* added. 'Exclusive use' however, does not mean that no one has used the

way except the claimant of the easement; it means that his right to do so does not depend upon a similar right in others." Town of Paden City v. Felton, 136 W. Va. 127, 137, 66 S.E.2d 280, 286 (1951) (emphasis added). In Paden City, the easement at issue was for a drainage ditch. The Paden City court found that property owners in the area, including the Town, had a common right to and use the ditch together for drainage. As the Town's right to use the ditch was in common with others, the court found the use to be permissive. Town of Paden City, 136 W. Va. at 140, 66 S.E.2d at 286. The Paden City court ultimately ruled the Town did not acquire a prescriptive easement because its right to use the easement was a right shared with others. To the extent that this Court requires exclusivity, Appellants also meet this requirement. No other individual or entity other than Appellants and Appellees and their predecessors in interest have, or have had the right to use the T.M. Newman Easement. See Tr. Tran. Plaintiffs' Ex. 3.

4. The Court Erred in Ruling the T.M. Newman Easement was in Gross

The Circuit Court focused on the absence of any ownership interest in the Newman Property by T.M. Newman at the time that he purchased the Easement as the basis for its ruling that the T.M. Newman Easement was in gross. However, the Circuit Court overlooked a number of facts in reaching its conclusion that show T.M. Newman had an interest in the Newman Property when he purchased the T.M. Newman Easement. Appellants argue that this interest is sufficient to establish that the T.M. Newman Easement is appurtenant.

In 1940, the Newman property was, and had historically been used as a family farm. At the time he purchased the Easement, T.M. Newman was living on the Property, as he did so for his entire life. Tr. Tran. p. 13 at 6–7. As a putative heir to his parents, T.M. Newman effectively had an inchoate or future interest in the Newman Property, as did each of his siblings, including Appellants' father, Hugh Newman. Arguably, T.M. Newman would have little need for the

Easement unless it was to provide himself, his parents, his siblings, and his decedents with a secure high water alternate route to access the Old Road and the family farm. After the death of T.M. Newman, Appellants and their ancestors used the easement T.M. Newman had purchased to access the Newman property.

Assuming sufficient ownership interest, with respect to the determination of whether an easement is appurtenant or in gross, West Virginia law states:

> If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intention of the grantee as to the use of such estate, and there is nothing to show the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate.

Syl. pt. 3, Stricklin v. Meadows, 209 W. Va. 160, 161, 544 S.E.2d 87, 89 (2001). See also Syl. Mays v. Hogue, 163 W. Va. 746, 260 S.E.2d 291, 292 (1979); Syl. pt. 1, Jones v. Island Creek Coal Company, 79 W. Va. 532, 91 S.E. 391 (1917). "Whether an easement is appurtenant or in gross is to be determined by the intent of the parties as gathered from the language employed, considered in the light of surrounding circumstances." Syl. pt. 4, Stricklin, 209 W. Va. at 161, 544 S.E.2d at 89, citing Post v. Bailey, 110 W. Va. 504, 159 S.E. 524 (1931). "[A]n easement will not be presumed to be in gross when it can fairly be construed to be appurtenant." Stricklin, 209 W. Va. at 164–65, 544 S.E.2d at 91–92, citing Post, 110 W. Va. at 508, 159 S.E. at 526.

There is significant evidence in the Agreement and the circumstances surrounding its purchase to conclude that the parties intended the T.M. Newman Easement to be appurtenant to the Newman Property. The Agreement clearly states T.M. Newman paid, and grantors accepted valuable consideration for the Easement and the right to build a road on it. Tr. Tran. Defendants' Ex. 1. The Agreement states the Easement is for "road purposes only" and it was shown on a map showing property of William Short, grantors' predecessor in interest, made in June 1940 by

Haworth Engineering Company. Tr. Tran. Defendants' Ex. 1. The Agreement contains a detailed property description of the Easement as it courses through Appellees' property and connects with the Old Road. Tr. Tran. Defendants' Ex. 1.

Other recitations in the Agreement clearly show the parties contemplated permanent access. T.M. Newman was granted the right to take and use any loose rock from grantors' adjoining lands for use in building a roadway on the Easement. Tr. Tran. Defendants' Ex. 1. Further, the Agreement obligated T.M. Newman to build a wall three feet high along the lower side of the Easement to protect the grantor's property, and also provided that T.M. Newman would pay for any damages caused to grantor's property by reason of the building of the road on the Easement. Tr. Tran. Defendants' Ex. 1. Finally, the Agreement provides that the Easement is for road purposes only, is to be used and enjoyed by both parties to the Agreement, and is not to be considered a public road. Tr. Tran. Defendants' Ex. 1.

The fact that the T.M. Newman Easement was recorded in the land records of Cabell County is substantial evidence that the parties intended the T.M. Newman Easement to be appurtenant. Tr. Tran. Defendants' Ex. 1. After 1940, subsequent purchasers of Appellees' property, totaling four (4) parties, including Appellees, all took their respective property subject to the Easement. The fact that Appellants never sought permission to use the T.M. Newman Easement, and Appellees' predecessors in interest neither granted permission nor denied Appellants access to the Easement is consistent with the parties' intent that the T.M. Newman Easement was intended to run with the Newman Property.

At the time of the Agreement, and now, the T.M. Newman Easement is an "appropriate and useful adjunct" to Appellants' Property. Syl. pt. 3, Stricklin, 209 W. Va. at 161, 544 S.E.2d at 89. Beginning in 1940, the Easement gave Appellants' ancestors alternate access to the

Newman Property that was not as susceptible to flooding on the Mud River. After 1977, when the Mud River washed away portions of County Road 26, the T.M. Newman Easement provided Appellants with their only access to their Property. The useful nature of the Easement is readily apparent in the wake of the lower Court's ruling, as now Appellants have no access to their Property. Without the right of access provided by the T.M. Newman Easement, Appellants' property has been rendered land-locked, inalienable, and essentially devoid of market value.

V. Conclusion

As the Circuit Court's erroneous rulings have now landlocked Appellants' Property and deprived them of their use and enjoyment of the same, and for all the foregoing reasons, Appellants Kenneth Newman and Marty Newman respectfully request that this Honorable Court reverse the Circuit Court's rulings and find that Appellees have established a prescriptive easement across the T.M. Newman Easement or in the alternative have established that the T.M. Newman Easement is an easement appurtenant to the Newman Property.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KENNETH DALE NEWMAN
AND MARTY NEWMAN

Appellants,

v. **CASE NO: 34332**

JAMES E. MICHEL, JR. AND
TOMASINA MICHEL, HIS WIFE

Appellees.

CERTIFICATE OF SERVICE

I, Charles K. Gould, certify that I have served the foregoing ***"Brief of Appellants"*** upon the following individual by mailing a true and correct copy of the same, first class postage prepaid, in an envelope addressed to the following counsel of record on this 6th day of January, 2009:

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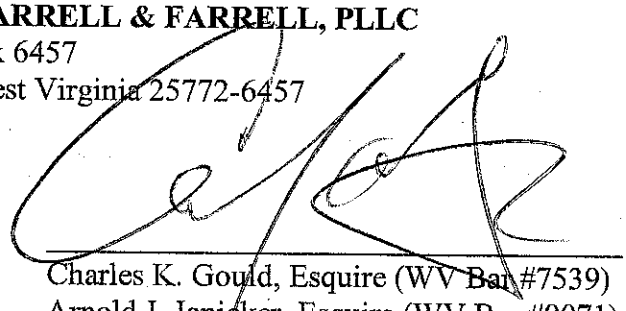

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